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AT

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 713

Case No. 766: PIQUILLOUD

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, Vice-President, presiding; Mr. Hubert Thierry; Mr. Francis Spain;

Whereas, on 20 May 1992, Jian-duo Zou Piquilloud, a former staff member of the United Nations, filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas at the request of the Applicant, the President of the Tribunal, with the agreement of the Respondent, extended the time-limit for the filing of an application with the Tribunal to 31 December 1993;

Whereas, on 30 November 1993, the Applicant, after making the necessary corrections, again filed an application containing the following pleas:

"(a) No preliminary or provisional measures are requested.

(b) The Applicant contests the refusal to grant her an extension of her contract, which was communicated to her on 5 February 1990.

(c) The Applicant invokes the following obligations of the Respondent towards her and requests, under article 9, paragraph 1 of the Statute of UNAT, the ordering by the Tribunal of their specific performance by the Respondent, as follows:

1. The Respondent shall annul the decision whereby her contractual status was allowed to lapse through the failure to implement General Assembly resolution 37/126.

2. The Respondent shall reinstate the Applicant at her prior level on an equivalent post with a view to a career appointment.

3. The Respondent shall compensate the Applicant for the material and moral injury she suffered during almost three years and for the costs incurred in the JAB proceedings and loss of her career opportunities.

(d) In the event that the Secretary-General decides, in the interest of the United Nations, not to reinstate the Applicant but to pay compensation for the injury sustained in accordance with article 9, paragraph 1 of the Statute of the Tribunal, the Applicant requests compensation as follows: An amount equal to the salary and emoluments for the period of two years to cover the normal extension period, including appropriate step increments which she would have received had she been extended on 31 December 1989.

(e) The Applicant requests to be present before the hearing of UNAT."

Whereas the Respondent filed his answer on 22 December 1993;

Whereas the Applicant filed written observations on 3 March 1994;

Whereas, on 27 June 1995, the Tribunal requested the Respondent to provide an answer on the merits, and the Respondent did so on 3 July 1995;

Whereas, on 7 July 1995, the Applicant filed additional documents and on 17 July 1995 submitted written observations on the Respondent's answer on the merits;

Whereas the facts in the case are as follows:

The Applicant, a former national of the People's Republic of China, entered the service of the Organization on 31 December 1984, as an Associate Translator at the P-2, step

1 level, in the Chinese Translation Section of the Languages Service of the Conference Services Division of the United Nations Office in Geneva (UNOG). The appointment was for a fixed-term period of five years, expiring on 30 December 1989. The letter of appointment stated, as a special condition, that the Applicant was "on secondment from the Government of the People's Republic of China". During the course of her employment with the United Nations, the Applicant was promoted to the P-3 level as a translator, with effect from 1 December 1986. The Applicant's performance, from 1 November 1986 to 29 February 1988, was rated as "a good performance". The Applicant signed the performance evaluation report, dated 29 February 1988, "with reservations" on 3 March 1988. She did not exercise her right of rebuttal, but stated her reservations in a communication dated 7 March 1988, placed in her personnel file. The Applicant's performance from 1 March 1988 to 31 December 1989 was also rated as "a good performance". The Applicant instituted a rebuttal to this report in accordance with ST/AI/240/Rev.2 and the proceedings of the panel set up to evaluate the rebuttal were completed on 21 June 1990, after the Applicant's separation from service.

On 1 August 1989, the Applicant wrote to the Personnel Officer in charge of the Languages Service inquiring as to "the arrangements made to initiate the necessary action for the renewal of my contract".

On 11 August 1989, the Chief of the Chinese Translation Section recommended the extension of appointments for three translators in his section. As regards the Applicant he stated in part:

> "[The Applicant], on the other hand, will have worked for the Organization for no less than five years by the end of this year. Since the retrenchment plan calls for the abolition of one P-3 post at my section and considering, above all, the fact that there are a large number of candidates who have received UN training and are waiting to be employed by the United Nations, it is logical that [the Applicant's] service should be terminated when her present contract expires and the post she currently occupies abolished."

On 6 September 1989, the Applicant married a Swiss/French citizen. On 13 September 1989, she so informed the Chief, Personnel Services, UNOG. She added that she had relinquished her Chinese nationality and that she had been informed verbally that her appointment in the Chinese Section would not be extended. She sought his assistance to find another suitable post within the United Nations system in the light of her qualifications and recently acquired master's degree in management.

On 21 September 1989, the Chief, Personnel Administration Section, informed the Applicant that in the light of the recommendation made by her Chief of Service, her appointment would not be renewed. She would be separated from the Organization with effect from 31 December 1989.

On 29 November 1989, the Chief, Personnel Administration Section, reiterated to the Applicant that her appointment would not be renewed and that she would be separated at the expiration of her appointment, on 31 December 1989.

On 18 and 29 January 1990, the Applicant wrote to the Chief, Personnel Administration Section, concerning the possibility of further employment with the United Nations. In a reply dated 5 February 1990, the Chief, Personnel Administration Section stated "concerning the possibility of renewing [her] contract against another post" that they had "endeavoured to identify a post matching [her] qualifications and experience in both ECE and UNCTAD but unfortunately without success so far".

On 6 February 1990, the Applicant wrote to the Secretary of the Joint Appeals Board (JAB) inquiring as to the procedures to be followed before that body.

On 3 March 1990, after obtaining counsel from the Panel of Counsel, the Applicant requested review of the decision not to extend her appointment. In a reply dated 16 March 1990, the Chief, Administrative Review Unit, acknowledged receipt of her request for review and noted that: "The period of two months specified for the relevant review in staff rule 111.2 (a) (ii) will begin to run from the date of this letter." If she was "not satisfied with the answer received" or if she did not "receive an answer from the Secretary-General within two months

of this letter", she could file an appeal with the JAB "within the following month, as provided in staff rule 111.2 (a) (i) and (ii) and 111.2 (c)".

On 14 December 1990, the Applicant lodged an appeal with the JAB. The Board adopted its report on 10 June 1993. Its considerations and conclusions read as follows:

> "29. The panel notes that on 21 September 1989 the Appellant was informed that her contract would not be renewed beyond 31 December 1989 (...) but that her letter to the Secretary-General requesting a review of this decision is dated 3 March 1990, i.e., it was more than three months beyond the time-limit specified in staff rule 111.2.
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> 30. In that letter the Appellant explains that the reason for the delay was that she had been told that the Administration would send her case to New York Headquarters and that she was expecting the Personnel Service to find her an alternative post.
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> 31. The panel then examined whether or not the Administration had made any promises to the Appellant which would justify her delaying the request to the Secretary-General for an administrative review. The panel concluded that there did not appear to be any such promise. The Chief of PAS' memorandum dated 29 November 1989 clearly reiterates the decision not to renew the Appellant's contract; at the same time, he reminded the Appellant that she was free to apply for any vacant post in the system. The panel did not consider that this could be interpreted as an engagement on the part of the Administration to try to find the Appellant another post.
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> 32. The panel notes that the Appellant's letter to the Secretary-General is dated 3 March 1990. Allowing for the two-month delay for not receiving a reply from Headquarters, the Appellant should have lodged her appeal at the JAB by 3 June 1990. However, her appeal is dated 14 December 1990 - more than six months beyond the time-limit prescribed by staff rule 111.2 (a) (ii). In fact, her appeal was received on 17 January 1991 (...).
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> 33. In her statement of appeal dated 14 December 1990, the Appellant gives two reasons for this delay: (i) that she had received no answer from the Secretary-General and (ii) her 'desire ... to allow more time for the UN Administration to find [her] a suitable opening'. The panel is of the view that the first reason is clearly at variance with staff rule 111.2 (a) (ii), with which she must have been familiar, and the second would appear to be an unjustified interpretation of the Chief of PAS' memorandum of 29 November 1989.

34. In the Appellant's reply, dated 15 April 1991, to the Respondent's contention that the appeal was irreceivable, the Appellant explained that the delay in filing her appeal was mainly due to her inability to find a counsel to present her case to the JAB. When she did manage to find a counsel, she had numerous difficulties in contacting him. The Appellant further explained that she was waiting for the report of the Rebuttal Panel on her PER. In addition, the Appellant argued that in Ms. D. Boernstein's (Chief of the Administrative Review Unit) letter to her dated 16 March 1990, the question of receivability had not been raised and that it informed her of the procedures to follow in the event of no reply from the Secretary-General.

35. Do any or all of these reasons constitute 'exceptional circumstances' under staff rule 111.2 (f) which would justify the panel in waiving the time-limits? The panel had at its disposal United Nations Administrative Tribunal Judgements No. 235, *Mathur*; No. 359, *Gbikpi*; and No. 527, *Han* in which the question of the receivability of an appeal relating to the observation of prescribed time-limits was raised. The panel, in particular, also took note of UNAT Judgement No. 372, *Kayigamba*, paragraph II of which reads as follows:

> '... only circumstances beyond the control of the appellant, which prevented the staff member from submitting a request for review and filing of an appeal in time, may be deemed 'exceptional circumstances' and warrant a waiver of the prescribed time-limits in accordance with the consistent jurisprudence of the Administrative Tribunal.' (New York, JAB Report No. 510, para. 33).

36. The panel also noted that, in his letter dated 8 February 1990, the JAB Secretary sent the Appellant a list of the members of the Panel of Counsel in Geneva, as well as the full text of Chapter XI of the Staff Rules. There does not appear to be any further correspondence between the Appellant and the JAB Secretary until she lodged her appeal in December 1990. The Staff Rules are quite clear about time-limits and that recourse to counsel is an option to which an appellant may resort. The Appellant did not seek the advice of the JAB Secretary as how to resolve the obvious conflict between the specified time-limits and the delay in her obtaining counsel, nor did she request the JAB Secretary for a waiver of the time-limit. The panel is of the view that there does not appear to be any 'exceptional circumstances' which were 'beyond her control' for not doing so.

37. The panel members also agreed that the delay in obtaining the report of the Rebuttal Panel to consider her objection of the PER was not a serious obstacle to the lodging of her appeal. In any event, the two amendments suggested by the Rebuttal Panel - to upgrade the ratings for her knowledge of French and for her attitude to the

United Nations (items 14 and 15 respectively of the PER) - do not have any material impact on the substance of the appeal.

38. Finally, the Appellant's quotation of Ms. Boernstein's letter of 16 March 1990 - of which there is no copy in the file - would appear to be an exaggerated interpretation of what seems to be a standard letter of acknowledgement of letters of appeal addressed to the Secretary-General.

Conclusion

39. The panel, therefore, *concludes* that the appeal is not receivable because the time-limits for filing an appeal have not been observed. There do not appear to have been any exceptional circumstances beyond the control of the Appellant which prevented her from filing her appeal within the time-limits specified in the Staff Rules and which would justify the panel waiving those limits."

On 6 July 1993, the Under-Secretary-General for Administration and Management informed the Applicant that the Secretary-General, having considered the report of the JAB, had decided as follows:

"The Secretary-General has approved the recommendation of the Board as contained in paragraph 39 of the report. Accordingly your appeal is not receivable and ... there are no exceptional circumstances to warrant waiver of the time limits specified in the U.N. Staff Rules."

On 30 November 1993, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The delay in appealing the decision not to extend her appointment was due to the Applicant's complete uncertainty as to when a final administrative decision was taken in her case.

2. The delay in lodging the appeal with the JAB was attributable to the Applicant's relying on counsel, recommended by the Administration, who was negligent in the exercise of his responsibilities.

3. The JAB delayed consideration of the case for 31 months.

4. The record shows that the sole reason why the Applicant was not granted a new appointment was that she was not acceptable to the Government of the People's Republic of China.

Whereas the Respondent's principal contentions are:

1. Staff rule 111.2 (a) specifies time-limits for lodging appeals against administrative decisions. The Applicant's request for a review of the contested decision was out of time.

2. The "Scope and purpose" provision of the Staff Regulations vests in the Secretary-General the authority and discretion to enforce the Staff Rules as he considers necessary. The Secretary-General's decision to apply staff rule 111.2 (a) was a proper exercise of this authority.

3. The Secretary-General's decision to apply staff rule 111.2 (a) is only reviewable if an applicant can establish prejudice or improper motive.

The Tribunal, having deliberated from 27 June to 28 July 1995, now pronounces the following judgement:

I. According to the practice followed by the Secretary-General, in accordance with staff rules 111.2 (a) and 111.2 (b), a waiver of the time-bar in requests for re-examination of administrative decisions contested by staff members of the Organization may be granted in

"exceptional circumstances". According to the Tribunal's practice, these circumstances are defined in the following manner: "any circumstances beyond the control of the Appellant which prevented the staff member from submitting a request for review and filing of an appeal in time, may be deemed exceptional circumstances" (cf. Judgement No. 372, *Kayigamba* (1986)).

II. The Secretary-General may use his discretion to ascertain the existence of exceptional circumstances justifying the waiver of the time-bar provided for by staff rule 111.2 (e). Nevertheless, the exercise of this discretionary power does not preclude the Tribunal's examination of the Secretary-General's motives from a legal perspective.

III. According to the Respondent, in the present case the Secretary-General's decision not to grant any specific time-limit to the Applicant was motivated less by considerations pertaining to her particular circumstances than by conditions arising from the Tribunal's Judgement No. 482 (*Qiu, Zhou* and *Yao* (1990)). This is expressed in paragraph 15 of the Respondent's answer: "In Respondent's submission the crucial issue in this case is whether the Secretary-General's decision to apply strictly the plain terms of staff rule 111.2 (a) was a valid exercise of discretion, given the unique circumstances facing the Organization after the Tribunal delivered Judgement No. 482". Also in the answer on the merits, the Respondent writes that: "Respondent wishes to again emphasize that Judgement No. 482 placed the Secretary-General in a very difficult position as there were too few posts to satisfy demands, so the review process was limited to applicants with timely appeals". This language could lead one to believe that if the Administration had not been faced with specific difficulties, the Secretary-General could have granted a waiver of the time-bar relating to the Applicant's request.

IV. It seems, in fact, that the Applicant's case corresponds, *prima facie* to the definition of "exceptional circumstances" cited above. She was prevented from presenting her request in a timely manner, partly because of her status as a staff member on secondment subject to the system of rotation applied to seconded staff members by the Chinese Government, and partly because of the negligence of her counsel who was, notwithstanding, picked from among the members of the United Nations Panel of Counsel.

V. The Tribunal considers that the Secretary-General's overall reasoning for not lifting the disbarment is not, in itself, unwarranted. However, it would not preclude the examination of specific cases in the light of their respective merits. In the present case the Secretary-General did not undertake such an examination. The Tribunal should not take the place of the Secretary-General in deciding whether the reasons given by the Applicant were sufficient for the waiver of the time-bar by virtue of "exceptional circumstances". It must, however, make sure that her reasons were given due consideration.

Since such was not the case the Tribunal will proceed to examine the case on the merits.

VI. The non-renewal of the Applicant's contract was motivated by the fact that no proposal for the renewal of her contract was made by the Translation Service.

According to the Chief of the Chinese Translation Section, preference had to be given, on account of the reduction of the number of posts, to two other Chinese staff members and thus the Applicant's employment would be terminated when her contract expired.

In fact, at the time when his proposal was made, the Applicant had lost her Chinese nationality as a result of marrying a Swiss citizen. She had also ceased to be on secondment from the Government of her country of origin.

VII. These facts could lead one to believe that the preference given to other Chinese staff members, those on secondment, was motivated less by consideration of the merits and performance of the candidates for renewal of their contracts than by their respective nationalities and administrative situations. It also appears that the Joint Appeals Board took an excessively long time to reach a decision on the Applicant's appeal. However, the Tribunal cannot determine with certitude what the result would have been if the Secretary-General, or the joint review group constituted following the rendering of Tribunal Judgement No. 482, had examined the Applicant's case. The Tribunal cannot therefore order the reinstatement of the Applicant, whose contract had expired (cf. Judgement No. 559, *Vitkovski* (1992)).

Nor can the Tribunal order that the Applicant's case be considered by the review group set up following the rendering of Judgement No. 482. The Tribunal, having noted the Applicant's request in that connection, endorses the contentions of the Respondent, who has emphasized that referring one case, that of the Applicant, to the review group would create insurmountable administrative difficulties. The Tribunal notes, on the other hand, that the Applicant's case was prejudiced by its not having been examined as it should have been, given the particular circumstances of her separation.

VIII. The Tribunal fixes the amount of the compensation to be paid to the Applicant for the prejudice that she suffered at twelve months' net base salary at the rate in force on the date of her separation from service and rejects all other pleas.

IX. For the foregoing reasons, the Tribunal orders the Respondent to pay the Applicant compensation in the amount of twelve months' net base salary at the rate in force on the date of her separation from service.

The Tribunal rejects all other pleas.

(Signatures)

Samar SEN
Vice-President, presiding

Hubert THIERRY
Member

Francis SPAIN
Member

Geneva, 28 July 1995

R. Maria VICIEN-MILBURN
Executive Secretary